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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JANE A. GRAFF, **Plaintiff and Appellant,** **v.** **VALLEJO CITY UNIFIED SCHOOL DISTRICT,** **Defendant and Respondent.**	**A106121** **(Solano County Super. Ct. No. FCS 020414)**

A motion for nonsuit is a procedural device that allows a defendant to challenge the sufficiency of a plaintiff's evidence. (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 117.) Effectively, the motion is a demurrer to the plaintiff's evidence that concedes the truth of the facts proved, but denies as a matter of law that they sustain the plaintiff's case. (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 27-28.) In this appeal, plaintiff Jane Graff challenges, among other things, the trial court's order granting a nonsuit as to all but one of her causes of action against defendant Vallejo City Unified School District (District) for employment discrimination. We reject each of plaintiff's contentions and affirm.

FACTUAL BACKGROUND

Plaintiff, who is deaf, was hired as a substitute teacher in April 1996. At that time, the District used a "manual system" for contacting substitutes to fill teacher absences

resulting from illness and other causes. Between 5:00 and 5:30 a.m. each school day, a clerk, called the substitute clerk or technician, would retrieve 85 to 100 answering machine messages from teachers requiring a substitute and, between 6:00 and 6:30 a.m., would begin calling and receiving calls to fill those positions. Plaintiff communicated with the substitute clerk using the California Relay System (CRS), which utilizes an operator who acts as an intermediary to receive and transmit information to and from a "hearing" caller to a deaf caller using a TTY (teletypewriter). Plaintiff substituted approximately five days during the 1995-1996 academic year, 64 days during the 1996-1997 academic year, and 123 days during the 1997-1998 academic year. Although registered with the District, plaintiff did not request work for the entire 1998-1999 academic year.

In due course, District officials determined that this manual system was ineffective, with absences frequently going unfilled, thereby causing disruption to student education and increased expense. The District established a committee to evaluate automated systems to manage teacher absences, and, in the spring of 1999, received two bids for an automated system. The District ultimately purchased the "Substitute Employee Management System" (SEMS) at an initial cost of $25,000. The SEMS uses six dedicated phone lines to engage in continuous contact with potential substitutes beginning as early as 5:30 a.m. until as late as 10:00 p.m. Teachers and substitutes have telephone access to the SEMS 24 hours a day. Substitutes calling into the SEMS enter a pin number, permitting them to receive up to three placement opportunities consistent with a substitute's skills profile. In addition, the District retained the substitute clerk from 6:30 a.m. to 3:30 p.m. to assist with any system problems or other emergencies.

Substitutes were notified by letter how to register and access the SEMS. The District also held workshops to demonstrate how to use the SEMS. The new system was activated on December 10, 1999.

Plaintiff first attempted to register with the SEMS in April 2000. The following month, she informed the substitute clerk and the District director of human resources (Nona Bowman) of her inability to access the new system with her TTY. Sometime later,

plaintiff was advised that the District had checked with the vendor and was informed that technology was not available to make the SEMS accessible via TTY. Although other substitutes were not permitted to contact the substitute clerk for work, plaintiff was told she could continue to contact the substitute clerk to learn of placement opportunities by TTY using the CRS. Plaintiff did not suggest any alternative solution to the problem. Bowman did not question plaintiff's representation that she could not access the SEMS by TTY.

Plaintiff continued contacting the substitute clerk via the CRS to receive her substitute placements. She substituted 13 days between April and June 2000, and another 60 days during the 2000-2001 academic year.

On October 26, 2000, plaintiff filed a discrimination charge against the District under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.) with the California Department of Fair Employment and Housing (DFEH) and the Equal Employment Opportunity Commission (EEOC). The EEOC charge alleged plaintiff had been denied substitute teaching opportunities because the District had not provided her with a reasonable accommodation, but did not allege she had been subjected to retaliation. The District accepted the EEOC's invitation to participate in a mediation, but the mediation was unsuccessful.

Following the mediation, Bowman wrote a May 18, 2001 letter to plaintiff advising her that she could continue to access placement opportunities by contacting the substitute clerk or by accessing the SEMS through the CRS. Bowman had been advised by an EEOC investigator that the SEMS could be accessed via the CRS. The letter invited plaintiff to contact Bowman if plaintiff required further reasonable accommodation.

Plaintiff filed suit in federal court and, in March 2002, a federal mediation went forward. In conjunction with this mediation, an attorney for plaintiff contacted the District, suggesting an internet-based technology to make the substitute placement information available online. In addition, Bowman learned from the producer of the SEMS that an internet-based system, "WebCenter," was under development, which

would be compatible with the SEMS phone-based system; however, WebCenter was not yet available for purchase.

The federal mediation proved unsuccessful, but enabled the District to learn that plaintiff carried a "Wyndtell" pager permitting her to send and receive email. Prior to March 2002, plaintiff had never suggested the District contact her on her Wyndtell pager. On March 19, 2002, Bowman met again with plaintiff to discuss her needs for accommodation. Bowman sent plaintiff an April 1, 2002 confirming letter stating, in part, that plaintiff could continue to contact the substitute clerk by telephone or email and that the District would be evaluating an internet-based application. The letter invited plaintiff to contact Bowman to discuss any further accommodation and enclosed a copy of the District's discrimination and complaint policy related to reasonable accommodations.

In April 2002, plaintiff began using email to contact the substitute clerk concerning placement opportunities. During the 2002-2003 academic year, starting in late January or February 2003, plaintiff contacted the District five to ten times and accepted a substitute placement once. During the 2003-2004 academic year, plaintiff accepted no work from the District despite being offered placement opportunities.

In the fall of 2002, the District submitted a requisition to purchase WebCenter. The District's governing board approved the purchase in December 2002. The vendor installed WebCenter in the Spring of 2003. Plaintiff was informed that the WebCenter system was operational, was given a pin number, but was only able to open the system once. The District experienced several problems making the new system functional, stable, and available online. WebCenter did not become fully operational until November 2003.

PROCEDURAL HISTORY

Plaintiff filed this action in Solano County Superior Court on August 16, 2002. The operative first amended complaint alleged causes of action for disability discrimination and retaliation (Gov. Code, § 12900 et seq.), violation of the Unruh Civil Rights Act (Civ. Code, § 51), unlawful business practice (Bus. & Prof. Code, § 17200),

and violation of California public policy. Later, the trial court sustained a demurrer to the Unruh Act and unlawful business practice causes of action, without leave to amend. Plaintiff does not challenge that ruling in this appeal.

On April 23, 2003, plaintiff filed a new discrimination charge with the EEOC alleging disability discrimination and retaliation. On August 22, 2003, she filed a supplementary complaint, which alleged causes of action for retaliation and breach of the covenant of good faith and fair dealing.

Trial of this action commenced on October 28, 2003. On November 5, 2003, District moved for nonsuit on the claims for disparate impact, disparate treatment, retaliation, failure to engage in the interactive process, breach of contract, and breach of the covenant of good faith and fair dealing. The trial court granted the motion for nonsuit, and allowed only the cause of action for failure to provide a reasonable accommodation to go to the jury. The same day, the jury returned a defense verdict on that claim. This appeal was timely filed.

DISCUSSION

I. *The Nonsuit Rulings*

Plaintiff contends the trial court committed reversible error in granting the motion for nonsuit on plaintiff's claims alleging failure to engage in the interactive process, disparate impact discrimination, disparate treatment discrimination and retaliation.

A. *Standards Applicable to Motion for Nonsuit*

"A trial court may grant a nonsuit only when, disregarding conflicting evidence, viewing the record in the light most favorable to the plaintiff and indulging in every legitimate inference which may be drawn from the evidence, it determines there is *no* substantial evidence to support a judgment in the plaintiff's favor. [Citations.]" (*Edwards v. Centex Real Estate Corp., supra,* 53 Cal.App.4th at pp. 27-28; see also Code Civ. Proc., § 581c.) Proof raising mere speculation for plaintiff is not sufficient to defeat a motion for nonsuit. Plaintiff bears the burden of establishing the elements of her case with evidence that supports a logical inference in her favor. (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1580.) However, if there is "any doubt" as to the

appropriateness of granting nonsuit, the trial court has a duty to let the case go to the jury. (*Golceff v. Sugarman* (1950) 36 Cal.2d 152, 153.)

Appellate review of orders granting nonsuit is quite strict. All inferences and presumptions are against such orders. (*People v. Ault* (2004) 33 Cal.4th 1250, 1266.) " 'The judgment of the trial court cannot be sustained unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law.' [Citations.] [¶] Although a judgment of nonsuit must not be reversed if plaintiff's proof raises nothing more than speculation, suspicion, or conjecture, reversal is warranted if there is 'some substance to plaintiff's evidence upon which reasonable minds could differ . . . .' [Citations.]" (*Carson v. Facilities Development Co*. (1984) 36 Cal.3d 830, 839.)

B. *Failure to Engage in the Interactive Process*

Plaintiff contends the trial court erred in granting nonsuit on her claim for failure to engage in the interactive process. She asserts the trial court was mistaken in believing such a claim is not a separate actionable violation of the FEHA. She argues that Government Code section 12940, subdivision (n) recognizes the failure to engage in the interactive process as a distinct, unlawful employment practice. She further argues that California and federal disability laws have historically imposed a mandatory obligation on the part of employers to engage in the interactive process.

The District counters that plaintiff never pled the alleged failure to engage in the interactive process as a separate cause of action, and, in any event, plaintiff presented insufficient evidence to support this claim.

1. *Governing Legal Principles*

An employer's obligation to engage in the interactive process to identify reasonable accommodations for an employee developed from federal regulations implementing the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.; see *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1137.) These regulations require employers to engage with employees in the interactive, good-

faith examination of possible accommodations intended to allow the employee to perform the job effectively. (*Humphrey*, at 1137; *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1116, vacated on other grounds (2002) 535 U.S. 391; see also *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 261.)

Employers who fail to engage in the interactive process in good faith face liability imposed by statute if a reasonable accommodation would have been possible (*Barnett v. U.S. Air, Inc.*, *supra*, 228 F.3d at p. 1116; *Humphrey v. Memorial Hospitals Ass'n*, *supra*, 239 F.3d at pp. 1137-1138), and if the employer is responsible for the breakdown in the interactive process (*Zivkovic v. Southern California Edison Co.* (9th Cir. 2002) 302 F.3d 1080, 1089). This obligation is a continuing one that persists "when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed." (*Humphrey*, at p. 1138.) This rule encourages employers to seek accommodations that "really work," and avoids an incentive for employees to "request the most drastic and burdensome accommodation possible out of fear that a lesser accommodation might be ineffective." *Ibid;* see *Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1387-1388 [where employer's supervisor is aware that earlier job restructuring was unsuccessful, a triable issue of fact existed as to whether further accommodation was necessary].)

In 2000, our Legislature expressly incorporated this obligation within the FEHA, through enactment of Government Code section 12940, subdivision (n), which affirms that an employer commits an unlawful employment practice if the employer "fail[s] to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition."[1] The requirement is triggered by either an

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[1] Although Government Code section 12940, subdivision (n) was enacted in 2000 and became effective January 1, 2001 (Stats. 2000, ch. 1049, § 7.5), California courts much earlier recognized the existence of a duty to engage in the interactive process by analogy to federal law upon which the FEHA was modeled. (See,e.g., *Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at pp. 262-263; see also *Prilliman v. United Air Lines, Inc.*

employee or his or her representative giving notice of the employee's disability and of the desire for accommodation. Once such notice is given, the interactive process becomes mandatory. (*Jensen v. Wells Fargo Bank, supra*, 85 Cal.App.4th at p. 261; *Barnett v. U.S. Air, Inc., supra*, 228 F.3d at p. 1114.)

2. *Legal Principles Applied to this Case*

In light of these principles, the trial court was mistaken in concluding that a claim for failure to engage in the interactive process is not a separate, actionable FEHA violation. Government Code section 12940, subdivision (n) unquestionably recognizes such a claim as a distinct violation of the FEHA. (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 243.) Notwithstanding the court's error, we are required to uphold the ruling if it is correct on any legal basis. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980-981; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2005) ¶¶ 8:214 to 8:215, pp. 8-128 to 8-129.) No prejudicial error results if the ruling itself is correct. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 610.)

The District argues we should uphold the ruling because plaintiff failed to plead this theory as a separate cause of action within the complaint. We disagree. When an issue has been tried by the parties without objection, the general rule confining the issues to the pleadings is inapplicable. (*King v. King* (1971) 22 Cal.App.3d 319, 324.) The extent to which the District engaged in the interactive process was unmistakably one focus of testimony throughout the trial. Plaintiff also asserted the matter in a proposed

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(1997) 53 Cal.App.4th 935, 948 [FEHA modeled on the federal laws including the ADA, thereby making decisions interpreting those federal laws useful in deciding cases under the FEHA].)

Additional evidence that our Legislature intended federal precedent to guide our interpretation of the duty to engage in the interactive process is contained in Government Code section 12926.1, subdivision (e), which states, "The Legislature affirms the importance of the interactive process between the applicant or employee and the employer in determining a reasonable accommodation, as this requirement has been articulated by the [EEOC] in its interpretive guidance of the [ADA]."

special jury instruction that the court rejected after granting the motion for nonsuit. Although plaintiff did not state a separate cause of action for failure to engage in the interactive process and waited until the end of the trial to provide the court with pertinent points and authorities supporting the claim, the matter was sufficiently tried by both parties to satisfy the exception to the general rule that otherwise would preclude judgment on issues outside the pleadings. (*Ibid*; cf. *Tri-Delta Engineering, Inc. v. Insurance Co. of North America* (1978) 80 Cal.App.3d 752, 760 [claim for breach of oral promise not stated in the pleadings, never the subject of jury instructions and never treated as within the scope of the issues].)

Nevertheless, we agree with the District that plaintiff failed to present sufficient evidence to support this claim. Specifically, no evidence was presented that any reasonable accommodation aside from those implemented by the District would have been possible at any point while the interactive process was ongoing, or that the District was responsible for a breakdown in the interactive process. (See *Barnett v. U.S. Air, Inc.*, *supra*, 228 F.3d at p. 1116; and *Zivkovic v. Southern California Edison Co.*, *supra*, 302 F.3d at p. 1089.)

When plaintiff first informed the substitute clerk and Bowman of plaintiff's inability to access the SEMS with her TTY, the District did not question her representation and investigated with the vendor whether any technology was available that would render the SEMS accessible via TTY. When that possibility was exhausted, the District informed plaintiff she could continue to contact the substitute clerk to learn of placement opportunities by telephone using the CRS. It is undisputed that plaintiff did not advise the District that this accommodation was unreasonable, nor request any alternative procedure be implemented. Instead, after six months passed, she filed her initial discrimination charge with the DFEH and the EEOC.

Even after plaintiff had filed this charge, the District continued its efforts to accommodate her. When the District learned that plaintiff used a Wyndtell device, it allowed her to communicate with the substitute clerk by email as well as by phone. And, the District pursued the WebCenter option.

Plaintiff argues she created a triable issue as to the District's good faith participation in the interactive process with evidence that on one occasion she was turned away when she went to the District personnel office, without an appointment, and was informed that Bowman was unavailable. Plaintiff testified that Bowman never tried to contact her after that day. However, there is no evidence that plaintiff asked to be contacted or informed the staff that the accommodation already being provided to her was unreasonable under the circumstances. Under these facts, there was no genuine dispute that the District engaged in the interactive process in good faith, and, hence, was entitled to nonsuit on the claim. (See *Barnett v. U.S. Air, Inc.*, *supra*, 228 F.3d at p. 1116.)

C. *The Retaliation Claim*

Plaintiff contends she presented sufficient evidence to establish a prima facie case of retaliation, and the trial court erred in granting the motion for nonsuit on this cause of action. We disagree. Government Code section 12940, subdivision (h) makes it an unlawful employment practice "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." To establish a prima facie case of retaliation, a plaintiff must show: (1) that she engaged in a protected activity; (2) that her employer subjected her to an adverse employment action; and (3) that there is a causal link between the protected activity and the employer's action. (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 814; *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.)

Here, plaintiff presented no evidence that the District ever took an adverse employment action against her following her complaint regarding the SEMS system. Instead, she relied solely upon the evidence underlying the accommodation claim that once the SEMS system had been initiated, the District never suggested any form of accommodation other than having her continue to contact the substitute clerk for placement opportunities. In effect, she argues the District's failure to remedy the situation complained of constituted retaliation for the complaint.

When, during argument on the nonsuit motion, the trial court pressed plaintiff's counsel to describe the evidence of retaliation, counsel provided no examples distinct from the District's alleged failures to provide a reasonable accommodation. Where, as here, the complaining party is unable to articulate any evidence of adverse action taken as a result of her protected activity, a nonsuit was appropriate.

D. *Disparate Impact and Disparate Treatment*

Plaintiff claims the trial court erred in granting nonsuit on her claims for disability discrimination based on disparate treatment and disparate impact. She claims she established a prima facie case for each theory of recovery with evidence that she was denied equal access to placement opportunities because the SEMS was not compatible with deaf communication devices like the TTY, in conjunction with use of a CRS operator.

The trial court ruled that all of the issues raised by the latter claims were already encompassed by plaintiff's chief claim for failure to provide reasonable accommodation for plaintiff's disability. On appeal, the District argues that the trial court's ruling should be upheld because these claims were not raised in the pleadings, and because plaintiff failed to present sufficient evidence to support such claims.

We reject the District's pleadings argument because the theories of disparate treatment and disparate impact were litigated in the trial, including in the motion for nonsuit, without an objection by the District that plaintiff had failed to articulate those theories in the operative pleading. Where, as here, no such objection was made in the trial court, the argument that the theories were outside the pleadings cannot be raised for the first time on appeal. (*Reid & Sibell v. Gilmore & Edwards Co.* (1955) 134 Cal.App.2d 60, 68.) The District's sufficiency argument will be discussed for the separate claims in turn.

1. *Disparate Treatment*

To establish a prima facie case of disparate treatment, a plaintiff must show: (1) she suffers from a disability; (2) she is a qualified individual; and (3) she was subjected to an adverse employment action because of the disability. (*Jensen v. Wells*

Fargo Bank, supra, 85 Cal.App.4th at p. 254.) As the third factor suggests, to prevail on a disparate treatment claim, plaintiff must show that "intentional discrimination was the 'determinative factor' in the adverse employment action." (Chin et al, Cal. Practice Guide: Employment Litigation (The Rutter Group 2005) [¶] 7:356, p. 7-49.) "In a disparate treatment case, liability depends on whether the protected trait . . . actually motivated the employer's decision." (*Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 610.) Simply stated, plaintiff presented no evidence suggesting that the District selected the SEMS *because* that system could not be used by a deaf substitute teacher. The grant of nonsuit on this claim was appropriate.

2. *Disparate Impact*

To establish a prima facie case of disparate impact, a plaintiff need only demonstrate that a particular practice disproportionately impacts persons in a protected status classification; the plaintiff need not show the employer harbored any discriminatory intent. (E.g., *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431; *City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal.App.3d 976, 985-986.) Disparate impact discrimination involves employment practices that are " 'facially neutral in their treatment of different groups but that in fact, fall more harshly on one group than another and cannot be justified by business necessity.' " (*Hazen Paper Co. v. Biggins, supra*, 507 U.S. at p. 609.) To prevail on such a claim, a plaintiff must prove that "regardless of motive, a *facially neutral* employer practice or policy, bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse effect on members of the protected class. [Citations.]" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, fn. 20.)

The District argues that the disparate impact theory of recovery is inapplicable to a discrimination claim based upon the alleged adverse impact of a facially neutral policy upon one person alone. The District reasons that a disparate impact claim based on one disabled person's experience is supplanted by that person's reasonable accommodation claim. Nothing in the FEHA, the ADA or the cases interpreting either law seems to compel the conclusion that a disparate impact claim requires more than one current

victim. (See *Gonzalez v. City of New Braunfels, TX* (5th Cir. 1999) 176 F.3d 834, 839 [under the ADA, an individual may challenge a facially neutral employment practice on the basis that it causes a disparate impact on the claimant].) It may be easier for a plaintiff to demonstrate that an employment practice has a disparate impact on a protected group with statistics, but a plaintiff is not required to employ that method. (See *Harris v. Civil Service Com.* (1998) 65 Cal.App.4th 1356, 1365 [disparate impact claims "usually" proved through statistical disparities].) While arguing that one adversely affected employee is insufficient to bring such a claim, the District never specifies how many are required, and it does not suggest a principled basis for determining that number.

In any event, we need not decide if a single impacted person may raise a disparate impact claim, because we conclude plaintiff presented insufficient evidence in support of it. A disparate impact claim involves a three-step burden of proof. The plaintiff has the initial burden to show that a facially neutral employment practice, adopted with no discriminatory motive, has a significant adverse effect on a protected class of individuals. (*Harris v. Civil Service Com., supra,* 65 Cal.App.4th at p. 1365; Chin et al, Cal. Practice Guide: Employment Litigation, *supra,* [¶] 7:535, p. 7-66.) Plaintiff certainly presented sufficient evidence to avoid a nonsuit on this aspect of her claim.

The defendant is then entitled to raise the defense of business necessity; the defendant must show that the challenged practice has " 'a manifest relationship to the employment in question.' " (*Harris v. Civil Service Com., supra,* 65 Cal.App.4th at p. 1366.) " ' "The touchstone is business necessity" [citation]; a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a [FEHA] challenge.' [Citations.]" (*City and County of San Francisco v. Fair Employment & Housing Comm., supra,* 191 Cal.App.3d at p. 989.) It is unclear whether plaintiff contests that the District has established this necessity. In her opening brief, plaintiff does argue that the District failed to establish that the selection of the SEMS was a business necessity. However, during the trial, plaintiff offered to stipulate that the manual system did not work and, in closing argument stated "You will hear absolutely no evidence, no argument from the plaintiff that the system, the manual

system, was a great system. We absolutely agree that the District had the right to go automated." The thrust of plaintiff's position in the trial court and in her opening brief is that while automation was necessary, the District selected the wrong *type* of automated system: it should have selected an internet-based rather than a telephone-based system. This argument goes to the third issue in a disparate impact case. If the defendant establishes a business necessity, the plaintiff has the burden of proving the existence of an effective alternative with less negative impact on the protected group. (*Harris v. Civil Service Com., supra*, 65 Cal.App.4th at p. 1366; Chin et al, Cal. Practice Guide: Employment Litigation, *supra*, at [¶] 7:537, p. 7-67.)

Plaintiff argues in her opening brief that her evidence established that "other substitute management systems allowing deaf employees access to information about substitute employment (such as internet-based systems) were on the market as early as March 2002. The evidence further established that other neighboring school districts, including Napa County School District, utilized internet-based substitute employee management systems while [the District] relied on SEMS. The District also admitted that although it knew about internet-based technology that would have been accessible by [plaintiff], it 'did not want to convert from the SEMS system' because of the 'unproven track record of the new internet-based technology.' " But plaintiff never has claimed, much less presented evidence that proved that a *workable* internet-based alternative existed prior to the District's adoption of the WebCenter system in the fall of 2002. The Napa Unified School District employed such a system, but plaintiff, herself, testified that she was unable to access it. The District conceded that it had been made aware of an internet-based system called AESOP in early 2002, but no one, including plaintiff's expert, testified that any school district had adopted it or that it worked. In fact, when the District selected an internet-based component to the SEMS, it took six months for it to become fully functional. Thus, the record is devoid of substantial evidence that a workable automated alternative to the SEMS existed that would have remedied the defects in the manual system with less disparate impact on plaintiff. Nothing in the record undermines the wisdom of the District's unwillingness to convert to an internet-

based system at the time it purchased the SEMS. Thus, the motion for nonsuit was properly granted as to this claim.

II. *Jury Instruction Regarding Obligation to Provide "Reasonable Access"*

Plaintiff contends the trial court committed prejudicial error in instructing the jury that the District had an obligation to provide "reasonable access" to the placement opportunities contained in the SEMS, instead of "equal access." She further claims the trial court erred in sustaining objections to questioning by her counsel that characterized the District's duty as requiring it to provide equal access.

"A party is entitled upon request to correct[] nonargumentative instructions on every theory of the case advanced by him [or her] which is supported by substantial evidence. The trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party's theory to the particular case." (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 572.) In a civil case, a judgment is not reversed for instructional error unless, after an examination of the entire record, the error resulted in a miscarriage of justice. (*Id.* at p. 580; Cal. Const., art VI, § 13.) Instructional error is prejudicial where it is probable that the error prejudicially affected the verdict. (*Soule*, at p. 580.) Prejudice is determined by evaluating the state of the evidence, the effect of other instructions, the effect of counsel's arguments, and any indication from the jury itself that it was misled. (*Id*. at pp. 580-581.)

At the outset, we note that plaintiff's argument mischaracterizes the content of the jury instruction given by the court,[2] which was based almost verbatim on CACI No. 2542

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[2] Pursuant to CACI No. 2542, the court instructed the jury, as follows: "A reasonable accommodation is a reasonable change to the workplace that allows an employee with a disability to enjoy the same benefits and privileges of employment that are available to employees without disabilities. [¶] Reasonable accommodations may include, but [are] not limited to the following: [¶] A. Making the workplace readily accessible to and usable by employees with disabilities; [¶] B. Changing job responsibilities or work schedules; [¶] C. Reassigning the employee to a vacant position; [¶] D. Modifying or providing equipment or devices; [¶] E. Modifying tests or training materials; [¶] F. Providing qualified interpreters or readers; or [¶] G. Providing other similar accommodations for an individual with a disability. [¶] If more than one accommodation

(Jan. 2006 ed.) and was phrased in terms of "reasonable accommodation," not "reasonable access."[3] The instruction the trial court gave is fully consistent with the pertinent FEHA provisions of the Government Code, which make it an unlawful employment practice for an employer "to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee" (Gov. Code, § 12940, subd. (m)), and with the FEHA definition of "reasonable accommodation" (Gov. Code, § 12926, subd. (n)).[4] (See also Cal. Code Regs., tit. 2, § 7293.9.)[5]

To support her contention, plaintiff relies upon an EEOC technical assistance manual interpreting the ADA, which provides that "Reasonable accommodation is a modification or adjustment to a job, the work environment, or the ways things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity. An equal employment opportunity means an opportunity to attain the same level of performance *or to enjoy equal benefits and privileges* of employment as are available to an average similarly-situated employee without a disability." (EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the [ADA] (Jan. 1992, No. EEOC-M-1A) pt. III, § 3.3, p. III-2 (as amended Oct. 29, 2002).) She also

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is reasonable, an employer satisfies its obligations to make a reasonable accommodation if it selects one of those accommodations in good faith."

[3] Plaintiff's assertion in her briefing that the trial court "spontaneously and unilaterally coined the term 'reasonable access' " is disregarded as unsupported by any record citation.

[4] Government Code section 12926, subdivision (n) states, in part: " 'Reasonable accommodation' may include either of the following: [¶] (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities. [¶] (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, . . . and other similar accommodations for individuals with disabilities."

[5] California Code of Regulations, title 2, section 7293.9 provides, in part: "Any employer or other covered entity shall make reasonable accommodation to the disability of any individual with a disability if the employer or other covered entity knows of the disability, unless the employer or other covered entity can demonstrate that the accommodation would impose an undue hardship."

relies upon an EEOC guideline: "14. [Question:] Does an employer have to provide reasonable accommodation to enable an employee with a disability to have *equal access* to information communicated in the workplace to non-disabled employees? [¶] [Answer:] Yes. . . . Employers must ensure that employees with disabilities have access to information that is provided to other similarly-situated employees without disabilities, regardless of whether they need it to perform their jobs." (EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the [ADA] (Oct. 17, 2002, No. 915.002) Requesting Reasonable Accommodation, ¶ 14 <http://www.eeoc.gov/policy/docs/accommodation.html> [as of Apr. 24, 2006], italics added.)

EEOC guidelines are "merely recommendations," and "do not set forth statutory requirements." (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 228.) Although EEOC guidelines can be useful in interpreting FEHA provisions, they are by no means controlling. (*Chapman v. Enos* (2004) 116 Cal.App.4th 920, 930, fn. 10.) Further, we see no material difference between the standard contained in the EEOC guideline and the one contained in the instruction provided. Each requires a reasonable accommodation, and the goal of that accommodation is to provide *equal* or *the same* benefits and privileges. The court's instruction, drawn directly from the pertinent FEHA section, accurately defined "reasonable accommodation," as a reasonable change to the workplace "that allows an employee with a disability to enjoy *the same benefits and privileges* of employment that are available to employees without disabilities." (Italics added.) This latter aspect of the instruction effectively communicated that for a change in the workplace to qualify as a reasonable accommodation, the change would have to allow the employee to enjoy equal benefits and privileges of employment as those offered to employees without disabilities. We conclude there was no instructional error.

Since "reasonable accommodation" was accurately defined in the jury instruction, the trial court did not abuse its discretion in requiring use of that phrase throughout the course of the trial to describe the nature of the accommodation required under the FEHA. By consistently using the same terminology throughout the trial, and then defining it

properly in the instructions to the jury, the court reduced any potential for jury confusion that could have resulted from permitting counsel to use additional phrases in front of the jury.

III. *Evidentiary Rulings Regarding Telecommunications Experiment*s

A. *District's Evidence of Successful Contact with the SEMS via TTY*

Plaintiff challenges the trial court's admission of testimonial and written evidence regarding Bowman's successful communication with the SEMS through use of a TTY in conjunction with a CRS operator. Plaintiff contends the evidence should have been excluded because it was created after the discovery cutoff date and involved an experiment by an unqualified lay person.

The record reflects that Bowman's testimony about these experiments was first elicited during cross-examination by *plaintiff's* counsel that extended, without objection, for more than 11 pages of reporter's transcript. Only later, when the District's counsel began examining Bowman on the same subject, did plaintiff's counsel object on the ground that the experiments were conducted after the discovery cutoff date. The trial court correctly overruled the objection since plaintiff's counsel had already opened the door to this line of inquiry through her extensive cross-examination on the subject. Since her own counsel was responsible for introducing this evidence before the jury, plaintiff has waived any right to complain on appeal that its admission was error. (*People v. Moran* (1970) 1 Cal.3d 755, 762.)

The record reflects that a similar waiver occurred for admission of the District's TTY/CRS tape evidence documenting Bowman's successful communication with the SEMS using the TTY via the CRS operator. When plaintiff's counsel sought admission of an unsuccessful attempt by plaintiff after the discovery cutoff date to access the SEMS using the TTY system, the District's counsel offered not to object to its admission, provided that the District's own tape from the Bowman experiment would also be admitted into evidence. Plaintiff's counsel agreed that all such TTY/CRS tapes would be admitted into evidence. The express agreement to allow admission of the evidence precludes plaintiff from challenging the evidence on appeal. (See *People v. Derello*

(1989) 211 Cal.App.3d 414, 428; *Nevada County Office of Education v. Riles* (1983) 149 Cal.App.3d 767, 779; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 8:250, p. 8-144.)

B. *Rebuttal Testimony by Plaintiff's Expert Witness*

Plaintiff challenges the trial court's refusal to permit expert testimony by her witness, Dmitri Belser, regarding how the deaf access the CRS operator. The trial court did not permit Belser to testify on the topic because plaintiff had not disclosed him as an expert on the CRS. Plaintiff contends that, notwithstanding the failure to disclose him as an expert on this subject matter, his testimony should have been permitted to impeach the evidence of Bowman's successful communication with the SEMS via the TTY.

Former Code of Civil Procedure section 2034, subdivision (m) (now § 2034.310 [Stats. 2004, ch. 182, § 23, eff. July 1, 2005]) permits a party to call an undisclosed expert to testify if "that expert is called as a witness *to impeach the testimony of an expert witness* offered by any other party at the trial. This impeachment may include testimony to the falsity or nonexistence of any fact used as the foundation for any opinion by any other party's expert witness, but may not include testimony that contradicts the opinion." (Accord, *Mizel v. City of Santa Monica* (2001) 93 Cal.App.4th 1059, 1067-1068, italics added.)

Here, the impeachment exception prescribed by former Code of Civil Procedure section 2034, subdivision (m) was inapplicable because the testimonial and documentary evidence that plaintiff sought to impeach was not *expert* testimony. It is undisputed that Bowman, in her capacity as the District director of human resources, was not a communications expert of any kind, but rather was testifying as a percipient witness to her successful lay attempts to communicate with the SEMS using the TTY in conjunction with a CRS operator. Indeed, the nature of Bowman's testimony was no different than plaintiff's own lengthy testimony describing her several unsuccessful lay attempts to access the SEMS using her own TTY in conjunction with a CRS operator. Likewise, the TTY/CRS tape transcription evidence of Bowman's successful communication with the SEMS is precisely the same type of evidence (albeit in mirror image) as the tape

transcriptions of plaintiff's unsuccessful attempts to do so. Thus, the impeachment exception for an undesignated expert witness, provided under former Code of Civil Procedure section 2034, subdivision (m) is unavailable to plaintiff in this instance.

IV. *The Court's Warning of the Potential Need to Declare Mistrial*

Plaintiff contends the trial court committed prejudicial error by warning counsel on two occasions, including once in the presence of the jury, that the court would declare a mistrial if the trial was not completed before the date by which the parties understood the court would become unavailable. Notably, however, plaintiff cites no legal authority in support of the contention and presents no discussion demonstrating how she was prejudiced by the court's remarks. Because plaintiff has failed to support this contention with reasoned argument and citation of authority, we deem the argument waived. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 8:17.1, p. 8-5.)

V. *Allowing the Jury to Learn of the EEOC Finding Adverse to Plaintiff*

Plaintiff contends the trial court committed reversible error in allowing the jury to learn of the EEOC's finding that the SEMS could be accessed using a CRS operator. In her appellate briefing, plaintiff represents that she brought an unsuccessful motion in limine to exclude references to the EEOC investigation and determination on the grounds that the evidence would be inadmissible hearsay (Evid. Code, § 1200 et seq.) and would be more prejudicial than probative (Evid. Code, § 352). Plaintiff did not include the written motion in limine in the appellate record. At the hearing on the motion, plaintiff's counsel expressed a concern that the EEOC would not permit its investigator to testify at the trial. The reporter's transcript includes no objection under section 352; however the transcript reflects a consensus reached between the court and counsel for both sides that the disputed evidence would be excluded if offered for the truth of the matters asserted, but could be admissible for impeachment purposes to show plaintiff knew the results of the EEOC's determinations.

On appeal, plaintiff asserts the trial court erred in failing to properly weigh the probative value and potential prejudice of the evidence when ruling on the motion, and

that the court erroneously allowed the EEOC determination into evidence as a business record. The District counters that plaintiff has failed to cite any authority to support her assertion that the EEOC findings should be inadmissible as more prejudicial than probative. The District further argues that plaintiff has forfeited any right to challenge the evidence on appeal by opening the door to its admission at trial through her direct testimony and by failing to object to the evidence when it was offered at trial. The District correctly points out that the trial court expressly informed counsel that its ruling on this (and other) in limine motions was tentative, and the court invited counsel to renew their objections during trial as the evidence was brought forward, if counsel believed the rulings should be changed.

Plaintiff has failed to present a record adequate to demonstrate error by the court in allowing admission of this evidence. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 8:17, p. 8-5.) Since plaintiff neglected to include the written in limine motion in the appellate record, we have no record of what arguments were presented to the trial court on this point, and, hence, have no basis upon which to evaluate their relative strength and whether the trial court acted outside the bounds of reason in rejecting them. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 [to establish an abuse of discretion occurred, the appellant must show that the court's exercise of discretion exceeded the bounds of reason, all of the circumstances before it being considered].) Likewise, plaintiff's briefing includes no citation of pertinent authority or reasoned argument supporting the hearsay aspect of the motion in limine. Due to her failure to adequately support these evidentiary contentions on appeal, they are deemed waived. (*Badie v. Bank of America, supra,* 67 Cal.App.4th at pp. 784-785.)

VI. *Counsel's Jury Argument on the Duty to Engage in the Interactive Process*

Plaintiff asserts the court committed prejudicial error by "allowing" the District's counsel to argue to the jury that plaintiff had the burden of finding a reasonable accommodation. She complains about two excerpts from the District's counsel's closing argument. In the first, the District's counsel stated: "Now, I suggest to you, plaintiff did

not participate in good faith in the interactive process. How do we know that? First of all, she has no suggestions of accommodation. She has none. She's the one who knows about the best technology. She's the one [who] knows about the Wyndtell. . . . She's not making suggestions, hey, I got a Wyndtell." In the second excerpt, the District's counsel stated: "Okay. What accommodation did you want? What accommodation was there that we didn't provide you? Until March 2002, the subject of internet technology never was raised. And even then, [plaintiff] says, hey, I don't care about internet technology. I just want something that gave me equal access. The instructions will tell you reasonable accommodation."

Plaintiff contends the court should have instructed the jury that plaintiff was not solely or primarily responsible for proposing a specific accommodation in order to trigger the District's duty to engage in the interactive process or to trigger its duty to provide a reasonable accommodation. We do not consider the merits of this contention because plaintiff neither objected to counsel's argument, nor requested that the jury be admonished to disregard it. Where, as here, no timely objection was made to counsel's purported misstatements to the jury, the claim of misconduct is not entitled to consideration on appeal. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1163.)

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

GEMELLO, J.